APPENDIX A

COURT OF APPEALS OF MICHIGAN

Docket No. 206740

AMMEX, INC.,
Plaintiff-Appellant,
v.
DEPARTMENT OF TREASURY,
Defendant-Appellee.

Submitted May 12, 1999, at Grand Rapids.
Decided Sept. 14, 1999, at 9:00 a.m.
Released for Publication Dec. 21, 1999

Before: SAWYER, P.J., and MURPHY and TALBOT, JJ.

TALBOT, J.

This case involves the state's imposition of motor fuel taxes and sales taxes on the gasoline and diesel fuel sold by plaintiffs to end-use consumers. Plaintiff is a Michigan corporation that owns a "duty-free" retail facility in the city of Detroit immediately adjacent to the Ambassador Bridge, which links the United States to Canada. Plaintiff's facility sells a variety of goods in "personal use" quantities, including gasoline and diesel fuel dispensed directly into the fuel tanks of its customers' vehicles. Every customer entering plaintiff's facility must exit the facility over the Ambassador Bridge into Canada. The fuel dispensing tanks on plaintiff's property are located less than two miles from the border between the United States and Canada. All of the roads from plaintiff's facility to Canada, including the Ambassador Bridge, are privately owned.

Since January 1, 1994, plaintiff has paid sales taxes and motor fuel taxes on its sales of motor fuel under protest. Plaintiff filed this action seeking a refund of the sales taxes and motor fuel taxes it paid under protest. In its complaint, plaintiff pleaded a variety of statutory and constitutional grounds. The case was submitted on stipulated facts to the Court of Claims, which entered an order of judgment in favor of the state. Plaintiff appeals as of right, and we affirm.

I

The motor fuel tax act, M.C.L. § 207.101 *et seq.*; MSA 7.291 *et seq.*, imposes a tax at a specific rate per gallon on all gasoline and diesel fuel sold in Michigan or used in propelling motor vehicles on the public roads and highways of Michigan. *See* M.C.L. § 207.102; MSA 7.292; *Roosevelt Oil Co. v. Secretary of State*, 339 Mich. 679, 685-686, 64 N.W.2d 582 (1954). The purpose of the act is to "prescribe a privilege tax for the use of the public highways by owners and drivers of motor vehicles." *See Roosevelt, supra* at 685, 64 N.W.2d 582. Although the tax is intended to be imposed on the ultimate consumer of gasoline or diesel fuel, it is collected by the supplier at the time of distribution. *See* M.C.L. § 207.108a; MSA 7.298(1); *Roosevelt, supra* at 686, 64 N.W.2d 582. In this case, plaintiff paid the motor fuel taxes "up front" when it purchased the gasoline and diesel fuel from its suppliers. The suppliers were required to remit the tax to the state, and plaintiff, in turn, had the ability to pass on the economic burden of the tax by including the amount of the tax in the price of the gasoline and diesel fuel sold to its customers. Finally, the motor fuel tax act provides that the "purchaser" of gasoline or diesel fuel used for a purpose other than the operation of a motor vehicle on Michigan's public roads and highways may file a claim for a refund of the taxes paid. *See* M.C.L. § 207.112(2); MSA 7.302(2), M.C.L. § 207.122(3); MSA 7.316(2)(3).

The General Sales Tax Act, M.C.L. § 205.51 *et seq.*; MSA 7.521 *et seq.*, imposes a tax measured by a percentage of the gross proceeds of a business. *See* M.C.L. § 205.52; MSA 7.522. The sales tax is imposed on the seller for the privilege of engaging in the business of making retail sales of tangible personal property in Michigan. *E.g., Univ of Michigan Bd. of Regents v. Dep't of Treasury*, 217 Mich.App. 665, 669, 553 N.W.2d 349 (1996). Although the legal incidence of the sales tax falls on the retailer, the retailer is authorized to pass the economic burden of the tax onto the purchaser by collecting an equal amount at the point of sale. *See World Book, Inc. v. Dep't of Treasury*, 459 Mich. 403, 408, 590 N.W.2d 293 (1999); *Nat'l Bank of Detroit v. Dep't of Revenue*, 334 Mich. 132, 138, 54 N.W.2d 278 (1952). When the property sold at retail is gasoline, the sales tax is collected from the retailer before the sale in much the same manner as motor fuel taxes are collected. *See* M.C.L. § 205.56a; MSA 7.527(1).

II

Plaintiff argues that the state's imposition of the taxes at issue in this case constituted a violation of the Import-Export Clause of the United States Constitution, which provides as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . . [U.S. Const., art. I, § 10, cl. 2.]

Under the "modern" approach to the Import-Export Clause, first announced in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), the primary focus is on the nature of the tax itself (i.e., whether it was an "impost" or "duty" within the meaning of the constitution) rather than on the nature of the item taxed (i.e., whether it was an "import" or "export" within the meaning of the constitution). *See Itel Containers Int'l Corp. v. Huddleston*,

507 U.S. 60, 76, 113 S.Ct. 1095, 122 L.Ed.2d 421 (1993); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359-360, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984); *Washington Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 751-753, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). The Supreme Court has identified three policy considerations underlying the clause:

> [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically. [*Michelin, supra* at 285-286, 96 S.Ct. 535.]

A tax is considered an "impost" or "duty" if its imposition offends one of these policy considerations. *See, e.g., Washington Stevedoring, supra* at 752, 98 S.Ct. 1388. Before *Michelin*, it was simply assumed that all taxes on imports and exports were prohibited. The issue in those cases was merely whether the item taxed was an import or export. *See Washington Stevedoring, supra* at 751-752, 98 S.Ct. 1388 (citing cases). This view was espoused by the United States Supreme Court in *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77-78, 67 S.Ct. 156, 91 L.Ed. 80 (1946), which held that the imposition of a nondiscriminatory state sales tax on the sale of oil intended for exportation from California to New Zealand ran afoul of the Import-Export Clause.

Plaintiff relies on *Richfield Oil* for the proposition that Michigan cannot constitutionally impose sales or motor fuel taxes on the gasoline and diesel fuel sold at its facility. The state, on the other hand, contends that the Supreme Court's holding in *Richfield Oil* has been undermined by the post-*Michelin* approach to Import-Export Clause jurisprudence. The *Richfield Oil* case, which has never been expressly overruled, involved a tax imposed directly on goods in export transit.[1] *See Richfield Oil, supra* at 84, 67 S.Ct. 156. The same cannot be said of *Michelin* or *Washington Stevedoring*. See *United States v. Int'l Business Machines Corp.*, 517 U.S. 843, 861, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996). In *Washington Stevedoring, supra* at 757, n. 23, 98 S.Ct. 1388, the Court specifically noted that it "did not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit." More recently, in *Int'l Business Machines, supra* at 862, 116 S.Ct. 1793, the Court explained that it "has never upheld a state tax assessed directly on goods in import or export transit." Accordingly, we must conclude that *Richfield Oil* has precedential value. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct.1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *see also Virginia Indonesia Co. v. Harris Co. Appraisal Dist.*, 910 S.W.2d 905, 911-912 (Tex., 1995).

Despite our determination that *Richfield Oil* has precedential value, we are not persuaded that it requires

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[1] Although the California sales tax at issue in *Richfield Oil* was a privilege tax imposed on the sale of the oil, the Supreme Court has explained that the tax on the sale of an article is effectively a tax on the article itself. See *Richfield Oil, supra* at 84, 67 S.Ct. 156, quoting *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 444, 6 L.Ed. 678 (1827).

reversal in this case. The California sales tax at issue in *Richfield Oil* was imposed on the sale of oil placed in the storage tanks of a ship bound for New Zealand. *Richfield Oil, supra* at 71, 67 S.Ct. 156. The Court determined that the oil was an "export" within the meaning of the Import-Export Clause because at the time it was taxed it had already begun its movement toward an intended foreign destination. *See id.* at 82-83, 67 S.Ct. 156. Under the "stream of export" doctrine, exportation commences when an article begins its physical entry into the export stream, which is its final, continuous journey out of the country. *See Washington Stevedoring, supra* at 752, 98 S.Ct. 1388; *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62, 66-71, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974); *Coe v. Errol*, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715 (1886). The word "export" means the transportation of goods from the United States to a foreign country. *Swan & Finch Co. v. United States*, 190 U.S. 143, 145, 23 S.Ct. 702, 47 L.Ed. 984 (1903). "[E]xportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country." *Id.* Thus, an article does not constitute an "export" if there exists a practical possibility of diversion to domestic markets. *See Joy Oil Co. v. State Tax Comm. of Michigan*, 337 U.S. 286, 288, 69 S.Ct. 1075, 93 L.Ed. 1366 (1949), citing *Richfield Oil, supra* at 82, 67 S.Ct. 156. Similarly, an article cannot be considered an "export" within the meaning of the Import-Export Clause if "it will be used in this country for its designed purpose, before being shipped abroad." *See Itel Containers, supra* at 82, 113 S.Ct. 1095 (Scalia, J., concurring), citing Richfield Oil, *supra; cf. Dep't of Revenue v. Midstream Fuel Service, Inc.*, 521 So.2d 75, 80 (Ala.Civ.App., 1988); *Shell Oil Co. v. State Bd. of Equalization*, 64 Cal.2d 713-718-719, 51 Cal.Rptr. 524, 414 P.2d 820 (1966).

Bearing these concepts in mind, we conclude that the gasoline and diesel fuel purchased at plaintiff's facility did not constitute "exports" within the meaning of the Import-Export Clause. It is clear that the end-use consumers who purchased fuel at plaintiff's facility in Michigan necessarily were required to use a portion of that fuel for its designed purpose within the United States before entering Canada. Accordingly, *Richfield Oil* is not directly applicable to the facts in this case. As Justice Scalia noted in his concurring opinion in *Itel Containers, supra* at 82, 113 S.Ct. 1095, no portion of the "export" in *Richfield Oil* was ever "used or consumed in the United States" and there was no probability that it would be "diverted to domestic use." Because a portion of the fuel purchased by each of plaintiff's customers was necessarily used within the United States, the transactions at issue in this case did not involve exportation.[2] To the contrary, they were merely domestic transactions occurring at a location near the international border.

For much the same reason, we also conclude that the tax at issue was not an "impost" or "duty" within the meaning of the Import-Export Clause as described in *Michelin, supra.* First, because the economic burden of the challenged taxes fell directly on end-use consumers purchasing fuel in the United States for immediate consumption, the taxes cannot be said to have affected the foreign policy of the United States. Second, because this case does not in any way involve importation, the taxes at issue could not have affected the federal government's ability to generate import revenues. Finally, because the fuel sales in this case were made to end-

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[2] The parties stipulated that all goods sold by plaintiff to its customers "must be exported from the United States." To the extent that this stipulation could be understood as a stipulation regarding the legal meaning of the word "export," it is not binding on this Court. It is well settled that a stipulation by the parties regarding a matter of law is not binding on a court. *In re Finlay Estate*, 430 Mich. 590, 595, 424 N.W.2d 272 (1988).

use consumers in Michigan, the state of Michigan cannot be said to have exploited its geographic location to the detriment of her sister states, nor can the taxes at issue be described as improper exactions on goods in export transit from other states. *See Michelin, supra* at 285-286, 96 S.Ct. 535; cf. *Arizona Dep't of Revenue v. Robinson's Hardware*, 149 Ariz. 589, 593-594, 721 P.2d 137 (1986). Therefore, we hold that plaintiff is not entitled to relief under the Import-Export Clause.

III

Plaintiff next argues that the state's imposition of the taxes at issue in this case amounted to a violation of the Commerce Clause of the United States Constitution, which grants Congress the power to regulate commerce with foreign nations and among the states. See U.S. Const., art. I, § 8, cl. 3. In particular, plaintiff contends that the taxes at issue interfered with the federal government's ability to regulate foreign commerce. We disagree.

With regard to interstate commerce, a state tax will be sustained against a Commerce Clause challenge if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state. *See Japan Line, Ltd. v. Los Angeles Co.*, 441 U.S. 434, 444-445, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979). Two additional factors must be considered when a state "seeks to tax the instrumentalities of foreign commerce." *Id.* at 446, 99 S.Ct. 1813. The first is whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation. The second is whether the tax prevents the federal government from speaking with one voice when regulating commercial relations with foreign governments. *Id.* at 451, 99 S.Ct. 1813.

Plaintiff has squarely addressed only three of the factors listed above. First, plaintiff claims that the motor fuel tax

was not fairly apportioned because the vehicles leaving its facility necessarily enter Canada without traveling over any public roads or highways in Michigan. This claim is without merit. Because the motor fuel tax act entitles fuel purchasers to receive a refund for taxes paid on gasoline or diesel fuel used for a purpose other than the operation of a motor vehicle on Michigan's public roads and highways, *see* M.C.L. § 207.112(2); MSA 7.302(2), M.C.L. § 207.122(3); MSA 7.316(2)(3), there is no apportionment problem.

Second, plaintiff claims that Michigan's sales tax, when applied to the sale of fuel at its facility, creates a substantial risk of international multiple taxation. This claim is also without merit. Because a sale of goods is a discrete taxable event involving payment and delivery in the taxing state that is "facilitated by the laws and amenities of the place of sale," it does not afford the opportunity of multiple taxation of the same activity. *See Oklahoma Tax Comm. v. Jefferson Lines*, Inc., 514 U.S. 175, 186, 190-191, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 9, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986); see also *W. R. Grace & Co.—Conn. v. Washington Dep't of Revenue*, 137 Wash.2d 580, 628-629, 973 P.2d 1011 (1999).

Finally, plaintiff maintains that the taxation of the motor fuel sold for "export" to Canada at its "duty free" facility unconstitutionally prevented the federal government from speaking with "one voice" regarding commercial relations with Canada because it interfered with the "free flow of goods from this country." Again, we disagree. The purpose of the "one voice" inquiry is to determine whether the challenged state tax unconstitutionally impairs the federal government's ability to speak with one voice when regulating commercial relations with foreign governments. *See Japan Line, supra* at 448, 99 S.Ct. 1813. To reiterate what we have already concluded above, the taxes at issue in this case cannot be said to have affected the foreign policy of the United

States because the economic burden of the taxes fell directly on end-use consumers purchasing fuel for immediate consumption in discrete transactions occurring entirely within the United States. For the reasons stated, we hold that plaintiff is not entitled to relief under the Commerce Clause.

IV

Plaintiff makes two equal protection arguments. First, plaintiff asserts that by not imposing any tax on the goods sold at its facility apart from motor fuel, the state has violated the Equal Protection Clause by taxing motor fuel differently than other goods. This argument is ludicrous. The equal protection doctrine mandates that persons in similar circumstances be treated similarly. *E.g.*, *Dowerk v. Oxford Charter Twp.*, 233 Mich.App. 62, 72-73, 592 N.W.2d 724 (1998). It does not mandate that products in similar circumstances be treated similarly.

Plaintiff's second equal protection argument more properly focuses on the law's treatment of it as compared to other persons. Plaintiff contends that the state's application of the motor fuel tax to retail sales at its facility coupled with the Treasury Department's position exempting automobile manufacturers from taxation on gasoline placed in new vehicles shipped out of Michigan violates the state and federal Equal Protection Clauses. We disagree.

As a general rule, legislative enactments are clothed in a presumption of constitutionality. This presumption is particularly strong where tax legislation is concerned. *Taxpayers United for the Michigan Constitution, Inc. v. Detroit*, 196 Mich.App. 463, 466-467, 493 N.W.2d 463 (1992). The Equal Protection Clause requires equal treatment for similarly situated taxpayers. *See Armco Steel Corp. v. Dep't of Treasury*, 419 Mich. 582, 592, 358 N.W.2d 839 (1984). Thus, disputed classifications must have a rational basis. *Id.* A rational basis shall be found to exist if any set of facts reasonably can be conceived to justify the alleged

discrimination. *Syntex Laboratories v. Dep't of Treasury*, 233 Mich.App. 286, 290, 590 N.W.2d 612 (1998). A discriminatory classification that has a rational basis is not invalid simply because it is not mathematically precise in its discrimination or because it results in some inequity. *Id.* at 290-291, 590 N.W.2d 612. In this case, we conclude that the classification separating plaintiff from automobile manufacturers putting gasoline in vehicles shipped out of Michigan had a rational basis. Plaintiff is a retail dealer selling gasoline to end-use consumers within the state of Michigan. In contrast, the gasoline included in the supply tanks of vehicles shipped out of Michigan would necessarily be purchased by end-use consumers outside the state of Michigan. Given that the stated purpose of the motor fuel tax is to tax drivers for the privilege of using Michigan's public highways, *Roosevelt, supra* at 685, 64 N.W.2d 582, the disputed classification is entirely logical.

Plaintiff also contends, without additional argument, that the state's tax scheme was in violation of the state constitution's Uniformity of Taxation Clause, Const. 1963, art. 9, § 3. As a practical matter, there is no discernible difference between the Equal Protection and Uniformity of Taxation Clauses. *Syntex Laboratories, supra* at 290, 590 N.W.2d 612. Accordingly, we need not address this particular aspect of plaintiff's argument.

V

Finally, in addition to its constitutional arguments, plaintiff contends that terms of the motor fuel tax act entitle it to a refund of the taxes paid. We disagree. As noted above, the tax act allows a "purchaser" of gasoline used for a purpose other than the operation of a motor vehicle on Michigan's public roads and highways to file a claim for a refund of the taxes paid. *See* M.C.L. § 207.112(2); MSA 7.302(2). Plaintiff submits that the gasoline sold at its facility was "exclusively used for a purpose other than the operation of a

motor vehicle" on Michigan's public roads and highways. This conclusion is not supported by the stipulated facts. Although plaintiff's customers must leave Michigan over private roads when they leave plaintiff's facility, it is certainly conceivable that some of those same customers might later reenter Michigan and drive on public roads and highways while still using gasoline purchased from plaintiff. Accordingly, the Court of Claims was correct when it observed that only the end-users of gasoline purchased at plaintiff's facility were in a position to know the amount of gasoline used for a purpose other than the operation of a motor vehicle on Michigan's public roads and highways. Because the stipulated facts do not show that the gasoline at issue was used for a purpose other than the operation of a motor vehicle on Michigan's public roads and highways, plaintiff is not entitled to relief under M.C.L. § 207.112(2); MSA 7.302(2).[3]

Affirmed.

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[3] Given the stipulated facts in this case, we need not determine whether plaintiff or any other retailer could ever qualify as a "purchaser" for purposes of M.C.L. § 207.112(2); MSA 7.302(2).

APPENDIX B

SUPREME COURT OF MICHIGAN

No. 116013
COA No. 206740

AMMEX, INC.
v.
MICHIGAN DEPARTMENT OF TREASURY

September 27, 2000

Prior Report: 237 Mich.App. 455, 603 N.W.2d 308.

Disposition: Application for leave to appeal from the September 14, 1999 decision of the Court of Appeals is DENIED. Plaintiff's motion to amend its application for leave to appeal is GRANTED.

CAVANAGH, J., would grant leave to appeal.

APPENDIX C

SUPREME COURT OF MICHIGAN

No. 116013. COA No. 206740.

AMMEX, INC.

v.

MICHIGAN DEPARTMENT OF TREASURY

February 26, 2001

Prior Report: —Mich. —, 618 N.W.2d 596.

Disposition: Motion for reconsideration of this Court's order of September 27, 2000 is DENIED.

CAVANAGH, J., would grant the motion for reconsideration, and on reconsideration, would grant leave to appeal.

APPENDIX D

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Docket No. 96-16367-CM
Hon. Peter D. Houk

AMMEX, INC.,
Plaintiff-Appellant,

v.

STATE OF MICHIGAN DEPARTMENT OF TREASURY,
Defendant-Appellee.

OPINION AND ORDER

INTRODUCTION

This matter has been submitted to the Court for trial on stipulated facts. Both sides have provided the Court with extensive briefs and reply briefs. The following facts constitute findings of the Court and were taken from the stipulated facts:

> Plaintiff is a Michigan Corporation and operates a "sterile" facility immediately adjacent to the Ambassador Bridge, which connects Detroit Michigan with Canada. The bridge is privately owned, as is the property upon which Plaintiff's facility is located. Plaintiff sells gasoline and diesel fuel to end use consumers at its facility. Persons who fuel their vehicles at the Ammex facility do not travel over public roads or property, but rather must enter Canada. It is more than a mile from the facility to the international border. Plaintiff has paid Michigan sales tax and gas and diesel

tax on all fuel sold at its facility since January 1, 1994. It has claimed a refund for those taxes.

Plaintiff asserts that they are entitled to a refund for several reasons. Plaintiff alleges in Count One of its Complaint that the fuel is exempt from taxation because it is not used to propel motor vehicles on Michigan roads. In Count Two, Plaintiff asserts a violation of the United States Constitution Commerce Clause. In Counts Three and Four, Plaintiff pleads a violation of the United States Constitution "Import-Export Clause" and "Foreign Commerce Clause". Count Five invokes the "Supremacy Clause" and Count Six the "Equal Protection Amendment". Count Seven pleads a violation of the State Revenue Act.

Plaintiff has failed to persuade the Court of the merits of its position.

NON-HIGHWAY USE EXEMPTION

The State Legislature in unambiguous language imposed a tax upon gasoline "sold *or* used" for propelling motor vehicles upon the roads of this State.[1] Plaintiff asserts that since the vehicles must leave the State of Michigan VIA private property that they are entitled to a refund of the taxes paid. The argument would have substantial force if Plaintiff had in fact paid the taxes, and a statutory mechanism did not exist for refunding the tax to the party responsible for paying

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[1] Sec. 2. (1) A specific tax at a rate of cents per gallon determined under subsection (2) or (3) is imposed on all gasoline and diesel motor fuel sold or used in producing or generating power for propelling motor vehicles used upon the public roads and highways in this state. The tax shall be paid at those times, in the manner, and by those persons specified in this act. It is the intent of this act to impose a tax upon the owners and drivers of motor vehicles using an internal combustion type of engine upon the public roads and highways of this state by requiring them to pay for the privilege of using the public roads and highways of this state, in addition to the motor vehicle license tax. MCL 207.102.

it. The statute places responsibility for paying the tax on the *owners and drivers of the vehicles,*[2] *not* the Plaintiff. The statute also provides a mechanism for those who pay the tax to claim a refund.[3] Plaintiff has not plead and the stipulation does not demonstrate that the "purchasers" have assigned their claims to Plaintiff and that such an assignment has been approved by the department as required by the statute.

There is no inherent inconsistency in the application of this procedure to Plaintiff's sales. First, unquestionably the product is "sold" in Michigan. Second, without question some of it must be consumed inside the State of Michigan. The purchaser, an end user, who is the only person who knows what portion is consumed outside the State of Michigan, can submit an affidavit for the appropriate amount and claim a refund.

"COMMERCE", "IMPORT EXPORT CLAUSES" SUPREMACY CLAUSES ARE NOT VIOLATED

This tax has no Federal or foreign implications. The statute authorizing this tax provides in pertinent part that,

> "Neither this act, nor any of its provisions, shall apply to foreign or interstate commerce" [4]

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[2] MCL 207.102

[3] The purchaser of gasoline used for a purpose other than the operation of a motor vehicle on the public roads, streets, and highways of this state, . . . shall be entitled to a refund of the tax on the gasoline. . . . A claim mailed within the 1-year period, as evidenced by the postmark, when received by the department, shall be considered as filed within the required time. . . . The retailer shall furnish the purchaser with an invoice, showing the amount of gasoline purchased, the date of purchase, and the amount of tax on the purchase. . . . A claim for refund shall have attached to the claim the original invoice received by the purchaser. . . . A claim for a refund shall not be assignable without the prior written consent of the department. MCL 207.1 12 (2).

[4] MCL 207.120

The Act has a provision licensing the export of gasoline, and provides that:

> (5) Sales of gasoline and diesel motor fuel by a supplier to a licensed exporter for export to another state or country to which the exporter is specifically licensed to export, or exports by a supplier, or exports for which the destination state motor fuel tax has been paid to the supplier and proof of export is available in the form of a destination state bill of lading *shall be exempt from the tax levied by this chapter* [5]. (emphasis supplied).

Plaintiff does not possess a license to export gasoline. Thus Plaintiff's individual retail sales to end users is not exempt from taxation. However, the end user is protected from multiple or unauthorized taxation because the statute provides for a refund where the gasoline is not used in a manner contemplated by the Statute. MCL 207.112.

The Supreme Court held in *Itel Containers Inernational Corporation v Huddleston*, 507 § U.S. 60, 113 S.Ct. 1095; 122 L.Ed.2d 421 (1993) that such a tax does not violate any of the trade clauses [6]:

> Furthermore, the foreign commerce clause cannot be interpreted to demand that a State refrain from taxing any business transaction that is also potentially subject to

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[5] MCL 207.120(5)

[6] U.S. Const, Art I, sec 10 restricts the powers of the States: "No state shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . . ." Article 1, sec 8 provides that, "The Congress shall have the power to lay and collect taxes, duties, imposts and excises . . . but all duties, imposts, and excises shall be uniform throughout the United States". The section further provides that Congress shall have the power to, "regulate commerce with foreign Nations, and among the several States and with the Indian Tribes." U.S. Const, Art, Art I, sec 9 limits the power of congress: "No tax or duty shall be laid on Articles exported from any State."

taxation by a foreign sovereign "Japan Line does not require forbearance so extreme or so one-sided." *Container Corp., supra*, 463 U.S., 21 193, 103 S.Ct., at 2955. Tennessee has decided to tax a discrete transaction occurring within the State. *See, Wardair Canada Inc v Florida Dept. of Revenue*, 477 U.S. 1, 9; 106 S.Ct. 2369, 2373, 91 L.Ed.2d I (1986). And, according to its interpretation of its revenue code, which we accept, Tennessee credits against its own tax any tax properly paid in another jurisdiction, foreign or domestic, on the same transaction. Tenn Code Ann. § 67-6-313(f) (1989). By these measures, Tennessee's sales tax reduces, if not eliminates, the risk of multiple international taxation. Absent a conflict with a "consistent international practice [or]. . . federal policy," *Container Corp.*, 463 U.S. at 190, 103 S.Ct., at 2953, the careful apportionment of a state tax on business transactions conducted within state borders does not create the substantial risk of international multiple taxation that implicates foreign commerce clause concerns. *Itel Containers International Corporation v Huddleston*, 507 U.S. 60,113 S.Ct. 1095 (U.S. 1993)

As previously noted this transaction can be exempted from taxation by a licensed exporter, and provisions have been made to refund taxes to individuals who purchase the product and do not use it in a manner taxable under Michigan law, thus the tax, "does not create the substantial risk of international multiple taxation that implicates foreign commerce clause concerns".

EQUAL PROTECTION ARGUMENTS

Plaintiff's reliance on the State and Federal equal protection clause[7] and the State of Michigan Uniformity of

[7] Mich Const 1963, Art 1, sec 3. U.S. Const, Amend XIV.

Taxation clause [8] is similarly misplaced. Plaintiff asserts that because the gasoline placed in the new motor vehicles that are then shipped out of State for sale is not taxed that Plaintiff is being treated unfairly. Plaintiff ignores the crucial fact that the sale of new automobiles occurs outside the State of Michigan. Unlike Plaintiff, the car companies are "exporting" a product, automobiles, for sale outside the jurisdiction of Michigan. Plaintiff here is making retail sales to the end user in Michigan. They are not similarly situated.

Plaintiff's claims under the Revenue Act [9] fail for the same reasons.

CONCLUSION

The taxation of retail sales of gasoline to end users does not violate the Constitution of the United States because it does not burden either interstate or foreign commerce. It does not violate the "equal protection clause" of either the Constitution of the United States or the State of Michigan because Plaintiff and the automobile industry are not similarly situated.

ORDER OF JUDGMENT

No cause of action exists against the Defendant and this case is DISMISSED.

Dated: August 20, 1997

/s/ Peter D. Houk
PETER D. HOUK
Court of Claims Judge

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[8] Mich Const 1963, Art 9, sec 3

[9] MCL 205.7

APPENDIX E

UNITED STATES CODE ANNOTATED
TITLE 19. CUSTOMS DUTIES
CHAPTER 4—TARIFF ACT OF 1930
SUBTITLE III—ADMINISTRATIVE PROVISIONS
PART IV—TRANSPORTATION IN BOND AND WAREHOUSING OF MERCHANDISE

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§ 1555. Bonded warehouses

(a) Designation; preconditions; bonding requirements; supervision

Subject to subsection (b) of this section, buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the

proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

(b) Duty-free sales enterprises

(1) Duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection.

(2) A duty-free sales enterprise may be located anywhere within—

(A) the same port of entry, as established under section 1 of the Act of August 24, 1912 (37 Stat. 434), from which a purchaser of duty-free merchandise departs the customs territory; or

(B) 25 statute miles from the exit point through which the purchaser of duty-free merchandise will depart the customs territory; or

(C) a port of entry, as established under section 1 of the Act of August 24, 1912 (37 Stat. 434), or within 25 statute miles of a staffed port of entry if reasonable assurance can be provided that duty-free merchandise sold by the enterprise will be exported by individuals departing from the customs territory through an international airport located within the customs territory.

(3) Each duty-free sales enterprise—

(A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory;

(B) if the duty-free sales enterprise is an airport store, shall establish and enforce, in accordance with such regulations as the Secretary may prescribe, restrictions on the sale of duty-free merchandise to any one individual to personal use quantities;

(C) shall display in prominent places within its place of business notices which state clearly that any duty-free merchandise purchased from the enterprise—

(i) has not been subject to any Federal duty or tax,

(ii) if brought back into the customs territory, must be declared and is subject to Federal duty and tax, and

(iii) is subject to the customs laws and regulation of any foreign country to which it is taken;

(D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration;

(E) may unpack merchandise into saleable units after it has been entered from warehouse and placed in a duty-free sales enterprise, without requirement of further permits; and

(F) shall deliver duty-free merchandise—

(i) in the case of a duty-free sales enterprise that is an airport store—

(I) to the purchaser (or a family member or companion traveling with the purchaser) in an area that is within the airport and to which access to passengers is restricted to those departing from the customs territory;

(II) to the purchaser (or a family member or companion traveling with the purchaser) at the exit point of a specific departing flight;

(III) by placing the merchandise within the aircraft on which the purchaser will depart for carriage as passenger baggage; or

(IV) if the duty-free sales enterprise has made a good faith effort to effect delivery for exportation through one of the methods described in subclause (I), (II), or (III) but is unable to do so, by any other reasonable method to effect delivery; or

(ii) in the case of a duty-free sales enterprise that is a border store—

(I) at a merchandise storage location at or beyond the exit point; or

(II) at any location approved by the Secretary before the date of enactment of the Omnibus Trade Act of 1987.

(4) If a State or local or other governmental authority, incident to its jurisdiction over any airport, seaport, or other exit point facility, requires that a concession or other form of approval be obtained from that authority with respect to the operation of a duty-free sales enterprise under which merchandise is delivered to or through such facility for exportation, merchandise incident to such operation may not be withdrawn from a bonded warehouse and transferred to or through such facility unless the operator of the duty-free sales enterprise demonstrates to

the Secretary that the concession or approval required for the enterprise has been obtained.

(5) This subsection does not prohibit a duty-free sales enterprise from offering for sale and delivering to, or on behalf of, individuals departing from the customs territory merchandise other than duty-free merchandise, except that such other merchandise may not be stored in a bonded warehouse facility other than a bonded facility used for retail sales.

(6)(A) Except as provided in subparagraph (B), merchandise that is purchased in a duty-free sales enterprise is not eligible for exemption from duty under subchapter IV of chapter 98 of the Harmonized Tariff Schedule of the United States if such merchandise is brought back to the customs territory.

(B) Except in the case of travel involving transit to, from, or through an insular possession of the United States, merchandise described in subparagraph (A) that is purchased by a United States resident shall be eligible for exemption from duty under subheadings 9804.00.65, 9804.00.70, and 9804.00.72 of the Harmonized Tariff Schedule of the United States upon the United States resident's return to the customs territory of the United States, if the resident meets the eligibility requirements for the exemption claimed. Notwithstanding any other provision of law, such merchandise shall be considered to be an article acquired abroad as an incident of the journey from which the resident is returning, for purposes of determining eligibility for any such exemption.

(7) The Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises. Regulations issued to carry out this paragraph

shall take into account the unique characteristics of the different types of duty-free sales enterprises.

(8) For purposes of this subsection—

(A) The term "airport store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from the customs territory from an international airport located within the customs territory.

(B) The term "border store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from the customs territory through a land or water border by a means of conveyance other than an aircraft.

(C) The term "customs territory" means the customs territory of the United States and foreign trade zones.

(D) The term "duty-free sales enterprise" means a person that sells, for use outside the customs territory, duty-free merchandise that is delivered from a bonded warehouse to an airport or other exit point for exportation by, or on behalf of, individuals departing from the customs territory.

(E) The term "duty-free merchandise" means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory.

(F) The term "exit point" means the area in close proximity to an actual exit for departing from the customs territory, including the gate holding area in the case of an airport, but only if there is reasonable assurance that duty- free merchandise delivered in the gate holding area will be exported from the customs territory.

(G) The term "personal use quantities" means quantities that are only suitable for uses other than resale, and includes reasonable quantities for household or family consumption as well as for gifts to others.

(c) International travel merchandise

(1) Definitions

For purposes of this section—

(A) the term "international travel merchandise" means duty-free or domestic merchandise which is placed on board aircraft on international flights for sale to passengers, but which is not merchandise incidental to the operation of a duty-free sales enterprise;

(B) the term "staging area" is an area controlled by the proprietor of a bonded warehouse outside of the physical parameters of the bonded warehouse in which manipulation of international travel merchandise in carts occurs;

(C) the term "duty-free merchandise" means merchandise on which the liability for payment of duty or tax imposed by reason of importation has been deferred pending exportation from the customs territory;

(D) the term "manipulation" means the repackaging, cleaning, sorting, or removal from or placement on carts of international travel merchandise; and

(E) the term "cart" means a portable container holding international travel merchandise on an aircraft for exportation.

(2) Bonded warehouse for international travel merchandise

The Secretary shall by regulation establish a separate class of bonded warehouse for the storage and manipulation of

international travel merchandise pending its placement on board aircraft departing for foreign destinations.

(3) Rules for treatment of international travel merchandise and bonded warehouses and staging areas

(A) The proprietor of a bonded warehouse established for the storage and manipulation of international travel merchandise shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. The warehouse proprietor's bond shall also secure the manipulation of international travel merchandise in a staging area.

(B) A transfer of liability from the international carrier to the warehouse proprietor occurs when the carrier assigns custody of international travel merchandise to the warehouse proprietor for purposes of entry into warehouse or for manipulation in the staging area.

(C) A transfer of liability from the warehouse proprietor to the international carrier occurs when the bonded warehouse proprietor assigns custody of international travel merchandise to the carrier.

(D) The Secretary is authorized to promulgate regulations to require the proprietor and the international carrier to keep records of the disposition of any cart brought into the United States and all merchandise on such cart.

APPENDIX F

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
GENERAL SALES TAX ACT

Current through P.A. 2000, No. 506 of the 2000 Regular Session, 90th Legislature

205.51. Definitions

Sec. 1. (1) As used in this act:

(a) "Person" means an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and includes the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) "Sale at retail" means a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any purpose other than for resale, or for lease, if the rental receipts are taxable under the use tax act, 1937 PA 94, MCL 205.91 to 205.111, in the form of tangible personal property to a person licensed under this act, or for demonstration purposes or lending or leasing to a public or parochial school offering a course in automobile driving. However, a vehicle purchased by the school shall be certified for driver education and shall not be reassigned for personal use of the school's administrative personnel. For a dealer selling a new car or truck, the exemption for demonstration purposes shall be determined by the number of new cars and trucks sold

during the current calendar year or the immediately preceding year without regard to specific make or style in accordance with the following schedule of 0 to 25, 2 units; 26 to 100, 7 units; 101 to 500, 20 units; 501 or more, 25 units; but not to exceed 25 cars and trucks in a calendar year for demonstration purposes.

(c) "Sale at retail" includes a conditional sale, installment lease sale, or other transfer of property if title is retained as security for the purchase price but is intended to be transferred later.

(d) "Sale at retail" includes the sale of electricity, natural or artificial gas, or steam, if the sale is made to the consumer or user for consumption or use rather than for resale. Beginning September 20, 1999, sale at retail also includes the sale of the transmission and distribution of electricity, whether the electricity is purchased from the delivering utility or from another provider, if the sale is made to the consumer or user of the electricity for consumption or use rather than for resale. Sale at retail also includes the sale of a prepaid telephone calling card or a prepaid authorization number for telephone use, rather than for resale, and also includes the reauthorization of a prepaid telephone calling card or a prepaid authorization number. Sale at retail does not include the sale of water through water mains or the sale of water delivered in bulk tanks in quantities of not less than 500 gallons.

(e) "Sale at retail" includes computer software offered for general sale to the public or software modified or adapted to the user's needs or equipment by the seller, only if the software is available for sale from a seller of software on an as is basis or as an end product without modification or adaptation. Sale at retail does not include specific charges for technical support or for adapting or modifying prewritten, standard, or canned

computer software programs to a purchaser's needs or equipment if those charges are separately stated and identified. Sale at retail does not include computer software originally designed for the exclusive use and special needs of the purchaser. As used in this subdivision, "computer software" means a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result.

(f) "Sale at retail" includes the sale of tangible personal property by an industrial laundry under a sale, rental, or service agreement with a term of at least 5 days.

(g) "Sale at retail" does not include an isolated transaction by a person not licensed or required to be licensed under this act, in which tangible personal property is offered for sale, sold, transferred, and delivered by the owner.

(h) "Sale at retail" does not include a commercial advertising element if the commercial advertising element is used to create or develop a print, radio, television, or other advertisement, the commercial advertising element is discarded or returned to the provider after the advertising message is completed, and the commercial advertising element is custom developed by the provider for the purchaser. As used in this subdivision, "commercial advertising element" means a negative or positive photographic image, an audiotape or videotape master, a layout, a manuscript, writing of copy, a design, artwork, an illustration, retouching, and mechanical or keyline instructions. Sale at retail includes black and white or full color process separation elements, an audiotape reproduction, or a videotape reproduction.

(i) "Gross proceeds" means the amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail within this state, without a deduction for the cost of the property sold, the cost of material used, the cost of labor or service purchased, an amount paid for interest or a discount, a tax paid on cigarettes or tobacco products at the time of purchase, a tax paid on beer or liquor at the time of purchase or other expenses. Also, a deduction is not allowed for losses. Gross proceeds do not include an amount received or billed by the taxpayer for remittance to the employee as a gratuity or tip, if the gratuity or tip is separately identified and itemized on the guest check or billed to the customer. In a taxable sale at retail of a motor vehicle, if another motor vehicle is used as part payment of the purchase price, the value of the motor vehicle used as part payment of the purchase price shall be that value agreed to by the parties to the sale as evidenced by the signed statement executed pursuant to section 251 of the Michigan vehicle code, 1949 PA 300, MCL 257.251. A credit or refund for returned goods or a refund less an allowance for use made for a motor vehicle returned under 1986 PA 87, MCL 257.1401 to 257.1410, as certified by the manufacturer on a form provided by the department of treasury, may be deducted.

(j) "Business" includes an activity engaged in by a person or caused to be engaged in by that person with the object of gain, benefit, or advantage, either direct or indirect.

(k) "Tax year" or "taxable year" means the fiscal year of the state or the taxpayer's fiscal year if permission is obtained by the taxpayer from the department to use the taxpayer's fiscal year as the tax period instead.

(l) "Department" means the revenue division of the department of treasury.

(m) "Taxpayer" means a person subject to a tax under this act.

(n) "Tax" includes a tax, interest, or penalty levied under this act.

(o) "Textiles" means goods that are made of or incorporate woven or nonwoven fabric, including, but not limited to, clothing, shoes, hats, gloves, handkerchiefs, curtains, towels, sheets, pillows, pillow cases, tablecloths, napkins, aprons, linens, floor mops, floor mats, and thread. Textiles also include materials used to repair or construct textiles, or other goods used in the rental, sale, or cleaning of textiles.

(2) If the department determines that it is necessary for the efficient administration of this act to regard an unlicensed person, including a salesperson, representative, peddler, or canvasser as the agent of the dealer, distributor, supervisor, or employer under whom the unlicensed person operates or from whom the unlicensed person obtains the tangible personal property sold by the unlicensed person, irrespective of whether the unlicensed person is making sales on the unlicensed person's own behalf or on behalf of the dealer, distributor, supervisor, or employer, the department may so regard the unlicensed person and may regard the dealer, distributor, supervisor, or employer as making sales at retail at the retail price for the purposes of this act.

205.52. Sales tax; rate

Sec. 2. (1) Except as provided in section 2a,[1] there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as defined in

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[1] Section 205.52a.

section 1,[2] an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.

(2) Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under this act shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the entire gross proceeds of both or all of his or her businesses. The taxes levied by this section are a personal obligation of the taxpayer.

205.56a. Prepayment of tax on gasoline at time of purchase or shipment

Sec. 6a. (1) At the time of purchase or shipment from a refiner, pipeline terminal operator, or marine terminal operator, a purchaser or receiver of gasoline shall prepay a portion of the tax imposed by this act at the rate provided in this section to the refiner, pipeline terminal operator, or marine terminal operator for the purchase or receipt of gasoline. If the purchase or receipt of gasoline is made outside this state for shipment into and subsequent sale within this state, the purchaser or receiver, other than a refiner, pipeline terminal operator, or marine terminal operator, shall make the prepayment required by this section directly to the department. Prepayments shall be made at a cents per gallon rate determined by the department and shall be based on 6% of the statewide average retail price of a gallon of self-serve unleaded regular gasoline as determined and certified by the department rounded up to the nearest 1/10 of 1 cent. A person who makes prepayments direct to the department shall

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[2] Section 205.51.

make those prepayments according to the schedule in subsection (5).

(2) The rate of prepayment applied pursuant to subsection (1) shall be determined every 6 months by the department unless the department certifies that the change in the statewide average retail price of a gallon of self-serve unleaded regular gasoline has been less than 10% during the 6-month period. However, the rate shall be determined not less than annually.

(3) A person subject to tax under this act who makes prepayment to another person as required by this section may claim an estimated prepayment credit on its regular monthly return filed pursuant to section 6.[1] The credit shall be for prepayments made during the month for which the return is required and shall be based upon the difference between prepayments made in the immediately preeeding month and collections of prepaid tax received from sales or transfers. A sale or transfer for which collection of prepaid tax is due the taxpayer is subject to a bad debt deduction under section 4i,[2] whether or not the sale or transfer is a sale at retail. The credit shall not be reduced because of actual shrinkage. A taxpayer who does not, in the ordinary course of business sell gasoline in each month of the year, may, with the approval of the department, base the initial prepayment deduction in each tax year on prepayments made in a month other than the immediately preceding month. Estimated prepayment credits claimed with the return due in January 1984 shall be based on the taxpayer's retail sales of gasoline in December 1983. The difference in actual prepayments shall be reconciled on the annual return in accordance with procedures prescribed by the department.

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[1] Section 205.56.

[2] Section 205.54i.

(4) At the option of the taxpayer the estimated prepayment credit may be claimed on the return required to be filed under Act No. 150 of the Public Acts of 1927, being sections 207.101 to 207.202 of the Michigan Compiled Laws, instead of a claim for the credit on the return required to be filed under section 6. Prepayments claimed on the motor fuel tax return shall be based on the difference in the prepayments made in the immediately preceding month and collections of prepaid tax received from sales or transfer and shall be for prepayments made in the month in which the return is due. A taxpayer electing an option under this subsection shall be entitled to a deduction under section 4i as permitted by subsection (3). Amounts credited pursuant to this section shall not be deducted from amounts required to be credited to the Michigan transportation fund pursuant to section 18b of Act No. 150 of the Public Acts of 1927, being section 207.118b of the Michigan Compiled Laws. The department may establish procedures for the election of claims under subsection (3) and this subsection to avoid duplication of claims.

(5) Notwithstanding the other provisions for the payment and remitting of tax due under this act, a refiner, pipeline terminal operator, or marine terminal operator shall account for and remit to the department the prepayments received pursuant to this section in accordance with the following schedule:

(a) On or before the twenty-fifth of each month, prepayments received after the end of the preceding month and before the sixteenth of the month in which the prepayments are made.

(b) On or before the tenth of each month, payments received after the fifteenth and before the end of the preceding month.

(6) A refiner, pipeline terminal operator, or marine terminal operator who fails to remit prepayments made by a purchaser or receiver of gasoline is subject to the penalties provided by Act No. 122 of the Public Acts of 1941, being sections 205.1 to 205.31 of the Michigan Compiled Laws.

(7) The refiner, pipeline terminal operator, or marine terminal operator shall not receive a deduction under section 4 [3] for receiving and remitting prepayments from a purchaser or receiver pursuant to this section.

(8) The purchaser or receiver of gasoline who makes prepayments is not subject to further liability for the amount of the prepayment if the refiner, pipeline terminal operator, or marine terminal operator fails to remit the prepayment.

(9) As used in this section:

(a) "Marine terminal operator" means a person who stores gasoline at a boat terminal transfer defined as a dock, a tank, or equipment contiguous to a dock or a tank, including equipment used in the unloading of gasoline from a ship and in transferring the gasoline to a tank pending wholesale bulk reshipment.

(b) "Pipeline terminal operator" means a person who stores gasoline in tanks and equipment used in receiving and storing gasoline from interstate and intrastate pipelines pending wholesale bulk reshipment.

(c) "Purchase" or "shipment" does not include an exchange of gasoline, or an exchange transaction, between refiners, pipeline terminal operators, or marine terminal operators.

(d) "Refiner" means a person who manufactures or produces gasoline by any process involving substantially more than the blending of gasoline.

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[3] Section 205.54.

APPENDIX G

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 207. TAXATION
MOTOR FUEL TAX
CHAPTER 1. GASOLINE TAX

207.101. Gasoline tax law; definitions

Sec. 1. As used in this act:

(a) "Gasoline" means gasoline, casing head or natural gasoline, benzol, benzine, naphtha, and any blend stock or additive that is sold for blending with gasoline other than products typically sold in containers of less than 5 gallons. Gasoline also includes a liquid prepared, advertised, offered for sale, sold for use as, or used in the generation of power for the propulsion of a motor vehicle, airplane, or motorboat, including a product obtained by blending together any 1 or more products of petroleum, with or without another product, and regardless of the original character of the petroleum products blended, if the product obtained by the blending is capable of use in the generation of power for the propulsion of a motor vehicle, airplane, or motorboat. The blending of all of the above named products, regardless of their name or characteristics, shall conclusively be presumed to have been done to produce motor fuel, unless the product obtained by the blending is entirely incapable for use as motor fuel. Gasoline also includes transmix. Gasoline shall not include diesel fuel, the taxation of which is provided under this act, commercial or industrial naphthas or solvents manufactured, imported, received, stored, distributed, sold, or used for exclusive use other than as a fuel for a motor vehicle, airplane, or motorboat, or an alcohol. An additive or blend stock is presumed to be sold for blending unless a certification is obtained for federal purposes that the substance is for a use other than blending for gasoline.

(b) "Blending" means the mixing of 1 or more petroleum products, with or without another product, and regardless of the original character of the product blended, if the product obtained by the blending is capable of use in the generation of power for the propulsion of a motor vehicle, airplane, or motorboat. Blending shall not include that blending which occurs in the process known as refining by the original refiner of crude petroleum, nor the blending of products known as lubricating oil in the production of lubricating oils and greases.

(c) "Blender" means a person who engages in the practice of blending.

(d) "Motor vehicle" means a motor vehicle as defined in section 33 of the Michigan Vehicle Code, Act No. 300 of the Public Acts of 1949, being section 257.33 of the Michigan Compiled Laws.

(e) "Supplier" means a person that imports or acquires immediately upon import gasoline or diesel motor fuel by pipeline or marine vessel from within a state, territory, or possession of the United States into a terminal or that imports gasoline or diesel motor fuel from a foreign country, or that produces, manufactures, or refines gasoline or diesel motor fuel within this state and in any case is also registered pursuant to 26 U.S.C. 4101 for tax-free transactions in gasoline. A retail dealer or wholesaler shall not be considered a supplier merely because the retail dealer or wholesaler blends alcohol with gasoline prior to the sale or distribution of the product.

(f) "Wholesale distributor" means a person that acquires gasoline or diesel motor fuel from a supplier or from another wholesale distributor for storage and subsequent sale and distribution by tank cars, tank trucks, or both, or that acquires gasoline or diesel motor fuel from a supplier or from another wholesale distributor solely for storage and consumption by

the person and who is required to accrue liability to or pay the tax required by this act on nonexempt gasoline or diesel motor fuel acquired from a supplier.

(g) "Retail dealer" means a person other than a wholesale distributor that engages in the business of selling or distributing gasoline or diesel motor fuel to the end user within this state. Retail dealer does not include a person licensed as a motor carrier under the motor carrier fuel tax act, Act No. 119 of the Public Acts of 1980, being sections 207.211 to 207.235 of the Michigan Compiled Laws.

(h) "Alcohol" means fuel ethanol excluding denaturant and water that is a minimum of 98% ethanol by volume.

(i) "Alcohol-gasoline fuel" means a gasoline, as defined by subdivision (a), which consists of not less than 10% alcohol and not more than 90% gasoline.

(j) "Diesel motor fuel" means any liquid fuel capable of use in discrete form or as a blend component in the operation of engines of the diesel type in motor vehicles including number 1 and number 2 fuel oils except that K-1 kerosene shall not be considered to be diesel motor fuel unless blended with diesel for use in motor vehicles with a diesel type of engine.

(k) "Public roads and highways" means every way or place generally open to the use of the public as a matter of right for the purpose of vehicular travel and maintained by the state or a political subdivision of this state, notwithstanding that they may be temporarily closed or travel is restricted for the purpose of construction, maintenance, repair, or reconstruction.

(l) "Person" means and includes a natural person, partnership, firm, association, joint stock company, syndicate, and corporation, both private and municipal, and any receiver, trustee, conservator, or any other officer having

jurisdiction and control of property by law or by appointment of a court other than units of government.

(m) "Department" means the revenue division of the department of treasury.

(n) "Commercial motor vehicle" means a road tractor, a truck tractor, or a truck having more than 2 axles, if the road tractor, or truck tractor or truck is propelled by diesel motor fuel. Commercial motor vehicle shall not include either a road tractor, a truck, or truck tractor owned by a farmer and used in connection with the farmer's farming operation and not used for hire.

(o) "Received" means the removal from any refinery or terminal, or the entry into Michigan from a foreign country of any gasoline or diesel motor fuel for consumption, use, sale, or warehousing, except for transfers in bulk to a terminal by registered suppliers. The tax imposed by this act which is measured by gallons received shall operate in the same manner as the tax imposed by sections 4081 to 4083 and section 4103 of the internal revenue code. [1] The definitions of the terms "removal", "entry", and "transfers in bulk" shall have the meanings ascribed to them in the internal revenue code as it existed on January 1, 1992.

(p) "Export" and "import" means when motor fuels are sold for export and delivered across the boundaries of this state by or for the seller, such action is presumed to be an export from the place of origin and an import into the destination state or country by the seller; and when motor fuels are purchased for export and transported across the boundaries of this state by or for the purchaser, such action is presumed to be an export from the place of origin and an import into the destination state or country by the purchaser.

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[1] 26 U.S.C.A. §§ 4081 to 4083 and 4083 and § 4103.

(q) "Terminal" means a motor fuel storage and distribution facility that is supplied by pipeline or marine vessel, and from which gasoline or diesel motor fuel may be removed at a rack. However, the term does not include any facility at which gasoline or diesel motor fuel blend stocks and additives are used in the manufacture of products other than gasoline or diesel motor fuel and from which no gasoline or diesel motor fuel is removed.

(r) "Bulk plant" means a gasoline or diesel motor fuel storage facility, other than a terminal, which is primarily used for redistribution of gasoline and diesel motor fuel by vehicles with a capacity of 4,200 gallons or less.

207.101a. Gallon, definition; tax refund when fuel measured in liters; conversion to or use of metric equivalent, units of measure to be clearly designated

Sec. 1a. (1) As used in this act, "gallon" means a unit of liquid measure as customarily used in the United States containing 231 cubic inches, or 4 quarts, or its metric equivalent expressed in liters. Where the term gallon appears in this act, the term liter is interchangeable so long as the equivalence of a gallon and 3.785 liters is preserved. A quantity required to be furnished under this act may be specified in liters.

(2) When a gasoline, diesel motor fuel, or liquefied petroleum gas quantity is measured in liters, a tax, refund, or other rate prescribed in this act in per-gallon units shall be divided by 3.785 to determine the tax, refund, or other rate per liter.

(3) Conversion to or use of a metric equivalent is permitted for convenience or continuity of transaction, when practicable. At all times equivalence of true amount or quantity shall be maintained and units of measure shall be clearly designated when necessary to avoid confusion of metric and nonmetric units of measure.

207.102. Gasoline and diesel motor fuel tax

Sec. 2. (1) A specific tax at a rate of cents per gallon determined under subsection (2) is imposed on all gasoline and diesel motor fuel sold or used in producing or generating power for propelling motor vehicles used upon the public roads and highways in this state. The tax shall be paid at those times, in the manner, and by those persons specified in this act. It is the intent of this act to impose a tax upon the owners and drivers of motor vehicles using an internal combustion type of engine upon the public roads and highways of this state by requiring them to pay for the privilege of using the public roads and highways of this state, in addition to the motor vehicle license tax.

(2) The tax rate imposed under subsection (1) is as follows:

(a) For the tax imposed on gasoline and diesel motor fuel before August 1, 1997, 15 cents.

(b) For the tax imposed on gasoline after July 31, 1997, 19 cents.

(c) For the tax imposed on diesel motor fuel after July 31, 1997, 15 cents.

(3) The state commissioner of revenue shall notify each supplier, wholesale distributor, and each retail dealer of gasoline in this state of the tax rate imposed under subsection (1) immediately after the tax rate is determined.

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207.108a. Collection of gasoline or diesel motor fuel tax by suppliers; due date; electronic funds transfer; surety bond; public money

Sec. 8a. A supplier, as defined in this act, who sells or distributes gasoline or diesel motor fuel, shall collect from the purchaser, the applicable rate of tax per gallon or fraction of a gallon on all gasoline or diesel motor fuel sold except that as to gasoline sold for purposes of blending with alcohol the supplier shall collect an amount of tax as measured by the applicable tax rate per gallon multiplied by 10/9. At the election of the wholesale distributor, the supplier shall not require a payment due date from the wholesale distributor of the tax earlier than the date on which the tax becomes due and payable to the state. This election shall be subject to a continuing condition that the wholesaler's remittances of all amounts of tax due to the supplier shall be by electronic funds transfer on or before the tax due date, and the wholesale distributor's right to elect under this section may be terminated at the supplier's option if the wholesale distributor does not make timely payments to the supplier as required by this section. Under procedures established by the commissioner, the supplier shall notify the commissioner of each wholesale distributor who makes an election under this section. The commissioner may require a wholesale distributor that pays the tax to the supplier on the date the tax becomes finally due and payable to the state to file with the dependent a surety bond payable to the state, upon which the wholesale distributor is the obligor, in an amount satisfactory to the department not to exceed 3 times the highest estimated monthly tax. The commissioner may also require that the bond indemnify the department against bad debt deductions claimed by a supplier under section 8. [1] All sums of money paid by the purchaser to the supplier as taxes upon gasoline or

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[1] Section 207.108.

diesel motor fuel, upon which the tax imposed by this act has not been paid to the department of treasury, shall be and remain public money and the property of this state until paid over to the department of treasury.

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207.120. Foreign or interstate commerce

Sec. 20. Neither this act, nor any of its provisions, shall apply to foreign or interstate commerce.

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CHAPTER 2. DIESEL MOTOR FUEL TAX

207.122. Discount, collection, payment, refund, and nonimposition of tax

Sec. 22. (1) There shall be allowed a discount of 6 cents per gallon of the tax imposed on diesel motor fuel pursuant to section 2(1) [1] if the diesel motor fuel is delivered into the fuel supply tanks of a commercial motor vehicle licensed under the motor carrier fuel tax act, 1980 PA 119, MCL 207.211 to 207.234.

(2) The tax on diesel motor fuel sold and delivered in this state by the retailer into the fuel supply tanks of motor vehicles shall be collected by the supplier and paid over monthly to the department except that the retail dealer shall pay over monthly to the department 6 cents of the tax imposed under section 2 for each gallon sold for delivery into or supplied into the fuel supply tanks of a motor vehicle that is not a commercial motor vehicle licensed under the motor carrier fuel tax act, 1980 PA 119, MCL 207.211 to 207.234, and eligible for discount allowed under subsection (1). Each diesel motor fuel retailer shall invoice sales of diesel motor fuel as prescribed by the department. Persons operating passenger vehicles of a capacity of 10 or more under a certificate of public convenience and necessity issued by the Michigan public service commission, or under a municipal franchise, license, permit, agreement, or grant, respectively, and operating over regularly traveled routes expressly provided for in the certificate of convenience and necessity, or municipal license, permit, agreement, or grant, shall be entitled to a refund of the tax paid in the manner provided in section 12. [2] Refunds provided for under this section to a state certificated operator of an intercity motor bus, shall

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[1] Section 207.102

[2] Section 207.112

apply only to those gallons of diesel motor fuel producing mileage traveled by each intercity motor bus over regular routes or on charter trips or portions of charter trips within this state. The tax shall apply to diesel motor fuel delivered in this state into the storage of a user or acquired by a user in any manner.

(3) An end use purchaser who has paid the tax on diesel motor fuel may claim a refund of the tax paid on diesel motor fuel used by the purchaser while operating a motor vehicle at a plant or jobsite while not on the public roads and highways of this state. The department may determine the formulae, methodology, and documentation necessary to implement this subsection.

(4) A tax is not imposed or collected under this act on diesel motor fuel used in motor vehicles owned by or leased and operated by a political subdivision of this state, or motor vehicles owned and operated by this state or the federal government.

(5) A tax is not imposed or collected under this act on diesel motor fuel purchased for use in school buses owned by or leased and operated by nonprofit private, parochial, or denominational schools, colleges, and universities and used in the transportation of students to and from school, or to and from school functions authorized by the administration of the eligible institution .

(6) A tax is not imposed or collected under this act by a supplier of diesel motor fuel if the fuel is purchased by an end user for any of the following purposes or for resale to an end user for any of the following purposes:

(a) For off-highway use.

(b) For use as a home heating oil.

(c) For export in compliance with section 3.[3]

(d) For use as other than motor fuel.

(e) For use in trains.

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[3] Section 207.103.